No. 72-402

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA, APPELLANT

v.

GENERAL DYNAMICS CORPORATION, THE UNITED ELECTRIC COAL COMPANIES, AND FREEMAN COAL MINING CORPORATION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

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Appellees suggest that there are no substantial questions for this Court because (1) the lower court's market definitions, even if erroneous, were immaterial to its conclusion that the Freeman-UEC combination had no anticompetitive effect and (2) UEC's "terminal condition" precludes the possibility of any such effect. However, the court's finding of a lack of anticompetitive effect was based squarely on its acceptance of the appellees' proposed geographic markets, and the

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record shows that UEC was far from moribund at the time of its acquisition.

1. Although the district court did say it would have found that no substantial lessening of competition resulted from the Freeman-UEC combination even if it had accepted the government's geographic markets (J.S. App. 59a–60a), the court's subsequent discussion of competitive effects (J.S. App. 60a–64a) was based upon its acceptance of "[t]he Freight Rate Districts in which the mines and reserves of United Electric [as] * * * separate and distinct [geographic] markets from those in which the mines of Freeman are located" (*id.* at 62a).

Appellees quote the lower court's alleged holding that there would be no Section 7 violation "even were this court to accept the Government's unrealistic product and geographic market definitions" (Motion to Affirm, p. 2; J.S. App. 66a). The court's full statement, however, was: "nor would divestiture benefit competition even if this court were to accept the Government's unrealistic product and geographic market definitions" (J.S. App. 66a). The ruling, therefore, was not with respect to the Section 7 violation, but with respect to whether the normal relief for such violation would here "benefit competition." As we have argued, one of the lower court's errors was its attempt to assess Section 7 violations by evaluating the "benefit[s]" of "divestiture" (J.S. 20–22).

The suggestion that the decision below accords with *Kennecott Copper Corp.* v. *Federal Trade Commission*, 5 Trade Reg. Rep. (1972 Trade Cas.) ¶74,157 (C.A. 10), petition for certiorari pending, No. 72–637

demand increases and more easily extractable coal

(Motion to Affirm, p. 11), is unfounded. The court of appeals not only rejected Kennecott's contention that the energy market rather than the coal market should have been adopted to assess the effect of the merger of a coal company and a potential entrant into the coal industry, but also concluded that interfuel competition has no significant effect upon coal prices in the national market. *Id.* at p. 92,840. Interfuel competition has even less impact in coal producing regions than in the nationwide market adopted in *Kennecott*.

2(a). In their attempt to portray UEC as a dying company, appellees dismiss UEC's reserve holdings and other uncommitted coal deposits in the Eastern Interior Coal Province as not "economically mineable" (Motion to Affirm, pp. 26, 33). But what is not economically mineable today may become so tomorrow. Reserves which cannot profitably be mined at one time may become economically mineable at a later time as it becomes exhausted. Thus when Mr. Organ testified that by 1960 there was no available economically mineable strip coal left in the area (Motion to Affirm, p. 33), he had in mind a maximum overburden ratio of 20 to 1[1] (Organ Dep. 111–112). At the time of trial, however, there were four strip mines in the Eastern Interior Coal Province operating at a greater average overburden ratio (DX 49) and another mine being developed which would have a 35 to 1 overburden ratio (Tr. 1980–1982).

[1] The overburden ratio expresses the number of cubic yards of overburden which must be removed to uncover a ton of coal (J.S. App. 16a, n. 17).

This limited view of what constitutes economically mineable reserves underlies appellees' claim that "vigorous efforts were commenced to acquire additional reserves" under their management (Motion to Affirm, p. 33). The testimony of UEC officers that the post-1959 management attempted to acquire "satisfactory reserves, mineable and merchantable, and capable of making a profit" (Camicia Dep. 196) does not mean that UEC attempted during the 1960's to acquire reserves for long-term development. UEC failed to acquire additional reserves after 1959 because it only attempted to acquire reserves which could be profitably developed in the near future. This is confirmed by a 1960 Board meeting at which the directors "decided not to pursue an aggressive purchasing policy" in the Industry Field area because "development of this field is probably some 10 years in the future * * *" (GX 201, p. 4023).

An Ayrshire executive testified that Ayrshire did acquire strip reserves in Illinois and Indiana after 1960 and that other coal producers had also done so (Tr. 1867–1869).[8] The Belle Rive field which UEC decided not to acquire in 1963 or 1964 (Inman Dep. 82–88) was being developed by another company at the time of trial (Tr. 1911). Commonwealth Edison was in the process of acquiring extensive central Illinois strip

[8] He also testified that his company was actively prospecting for strip reserves in Illinois, Indiana and western Kentucky (Tr. 1914). Thus the industry apparently did not share Mr. Organ's conviction (Motion to Affirm, p. 33) that, by 1960, all useable coal strip reserves in the Eastern Interior Coal Province were committed.

reserves at the time of trial which it expected to use (Tr. 1625, 1644, 1667–1668).

(b) The record does not establish that it will be impossible economically to mine any significant portion of the billions of tons of strip reserves in the Eastern Interior Coal Province which remained uncommitted at the time of trial in 1970[3] before UEC's present mines are exhausted.[4] Since appellees' claim that UEC is a self-liquidating company is essentially an affirmative defense, akin to the failing company defense, it was incumbent on them to demonstrate that these reserves will not become economically mineable.

Nor does the record establish that UEC's existing strip reserves in Industry Field cannot be profitably mined in the future. The appellees cite the testimony of Paul Weir, whose company was a litigation consultant for the appellees, that he did not think Industry Field would ever be mined (Motion to Affirm, p. 25).

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[3] The Illinois State Geological Survey estimated that 19 billion tons of strip reserves remained in the ground in Illinois in 1968 (Simon Dep. Ex. 1, pp. 62–63). In the same year coal producers owned, leased or had optioned approximately 1.78 billion tons of strip reserves in the Eastern Interior Coal Province (DX 62). Appellees have misunderstood the Jurisdictional Statement in assuming that references to other available reserves refer to reserves now owned by UEC rather than uncommitted reserves UEC can acquire (see Motion to Affirm, p. 26).

[4] The district court did not find that such reserves will not be mineable; rather it said that some evidence had been introduced indicating that "economically mineable strip reserves that would permit United Electric to continue operations beyond the life of its present mines are not available" and the government had introduced no evidence that such reserves were "*presently* available" (J.S. App. 63a).

A 1959 asset evaluation report of the Paul Weir Company stated however: "The * * * Industry Field will have substantially higher stripping ratios. In time, competitive conditions will permit their profitable development" (GX Kolbe Dep. Exh. 59, p. 3).[5] Although Mr. Nugent, UEC's president, testified that he no longer believed the field would be mined (Tr. 1946), UEC's officers had always assumed in the past that it would be mined in the future (GX 201, p. 4023; Inman Dep. 162, Nugent Dep. 343–346)[6] and had declined to consider an offer to find another purchaser for the property (Kolbe Dep. 816).

(c) Appellees' present suggestion that UEC's existing reserves in Round Prairie are worthless (Motion to Affirm, pp. 24, 26–29) is similarly based on the assumption that, to have value, reserves must be "economically mineable" presently or in the near future. This is indicated by their reliance on the Government's statement at pretrial that "*as of today* [the reserves] are not commercially valuable" (emphasis added) (Motion to Affirm, p. 24). Appellees never

[5] Their subsequent litigation report cited by appellees as confirming that these reserves "had no promise" (Motion to Affirm, p. 25) describes the reserves as "marginal" and states that the reserves "would not be competitive in the foreseeable future * * *" (DX 37, p. 4).

[6] Appellees claim that Mr. Nugent's deposition testimony "in its entirety" demonstrates that he believed the Industry Field "had no promise" (Motion to Affirm, p. 25, n. 30). We submit, however, that the testimony as a whole indicates that he then expected that the field would be mined after the Fulton County coal is exhausted, but he believed the pre-1959 management should not have paid so much money for a field which will not be mineable until the 1980's.

suggested at trial that UEC's deep reserves in Round Prairie cannot be profitably mined in the future.

The record does not support appellees' suggestion that UEC acquired these reserves for Freeman (Motion to Affirm, p. 27). To the contrary, a UEC director denied that UEC ever planned to "turn over" this corporate opportunity to Freeman (Tr. 893–894).

Appellees apparently rely solely upon Mr. Camicia's statement that he thought it "would be a mistake" for UEC to enter deep mining as establishing that this financially strong company could not do so.[7] Since Mr. Camicia also said that he thought Ayrshire had made a mistake in entering deep mining (Tr. 1426),[8] expressed skepticism as to the wisdom of Humble's venture (Tr. 1424), and testified that he had advised Kennecott that it could only make a successful entry into deep coal mining by acquiring a coal company (Tr. 1395–1396), his testimony merely reflects his view that it would be a mistake for any company to enter deep coal mining. In *Kennecott,* the Federal Trade Commission and the court of appeals held that Kennecott Copper Corporation's acquisition of the Peabody Coal

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[7] DX 81–83 and the opinion in *United States* v. *Standard Oil Co.* (New Jersey), 253 F.Supp. 196 (D. N.J), merely state that Standard Oil is a very large company with adequate capital to enter potash mining.

[8] Appellees' discussion of Ayrshire's entry into deep mining omits some important facts. The deep mining companies Ayrshire acquired were quite small (Tr. 1869) and Ayrshire did not decide to abandon deep mining when its first venture proved unprofitable. An Ayrshire executive testified that the company expects to mine other deep reserves which it owns (Tr. 1872).

Company, a deep and strip mining company, violated Section 7 because Kennecott was a potential entrant into the coal business by internal expansion or limited acquisition. This suggests that at least one court of appeals would disagree with Mr. Camicia's conclusions respecting the impossibility of a grass roots entry into deep coal mining.

Thus, the record does not establish that UEC was destined to disappear in 1959, or even in 1970. The case thus presents substantial questions for this Court's consideration.

Respectfully submitted.

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